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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 590

CLYDE E. CLAPPER,
Petitioner,

vs.

THE ORIGINAL TRACTOR CAB COMPANY, INC.,
AND STANLEY WILLIAMS,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Clyde E. Clapper, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit wherein attorneys' fees and expenses incurred in the patent infringement defense was included as an element of damages in the antitrust action, and a separate award of attorneys' fees for prosecution of the antitrust action is believed excessive in view of the amount of compensatory damage granted by the Trial Court in the antitrust action.

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW.

The Seventh Circuit Court of Appeals' denial of Petitions for Writs of Mandamus filed by Petitioner's licensees, seeking to dismiss Respondents' counterclaim and cross-complaint for lack of proper venue, dated April 20, 1954, is reported at 212 F.2d 371.

The opinion of the District Court for the Southern District of Indiana, Indianapolis Division, dated January 13-14, 1958 and July 9, 1958, reported at 165 F. Supp. 565, is reproduced in the Appendix Exhibit A.

The Court of Appeals opinion dated September 30, 1959, reported at 270 F.2d 616, is reproduced in the Appendix Exhibit B.

Other decisions related to this case are Justice Whitaker's denial of Respondents' Motion to Intervene in a suit brought by the Government for antitrust violation instigated by Respondents, styled *United States* v. *Bearing Distributors Co. et al.*, filed in the Western District of Missouri, Western Division, reported at 8 F.R.D. 228 and the Final Judgment issued in the same case, unreported, but reproduced in the Appendix Exhibit C.

Mason City Tent & Awning Co. v. *Clapper et al.*, reported at 144 F. Supp. 754, is reproduced in the Appendix Exhibit D.

JURISDICTION AND JUDGMENT TO BE REVIEWED.

This Court has jurisdiction under Title 28, U.S. Code, Secs. 1254, sub-paragraph (1), and 2101, sub-section (c).

The judgment of the Seventh Circuit Court of Appeals sought to be reviewed was entered September 30, 1959. A certified transcript of the record in the case, including the proceedings in the Court of Appeals, is furnished herewith in compliance with Rule 21 of this Court.

An order dated November 25, 1959, granting 30 days extension of time within which to petition for certiorari, was granted by the Court of Appeals for the Seventh Circuit.

The conflict between the Second Circuit and the Seventh and Tenth Circuits as to construction of 15 U.S.C.A., Sec. 15, and 35 U.S.C.A., Sec. 285, is believed confers on this Court jurisdiction to review the above judgment by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW.

1. Was it legally proper for the Court of Appeals in the instant case to include as an element of the trebled anti-trust damages, attorneys' fees and expenses allowed Respondents for defense of the patent infringement action?

2. Is the question posed in (1) above decided correctly by the Second Circuit in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791, or by the Tenth Circuit in *Kobe, Inc.*, v. *Dempsey Pump Co.*, 198 F.2d 416, certiorari denied 73 S. Ct. 46, and by the Seventh Circuit in this suit?

3. Were the separate awards of attorneys' fees to Respondents, one for antitrust prosecution, the other for defense of the patent infringement action, trebled by the Appeal Court as an item of damage, legally proper in view of the fact that the basis for the patent defense award is the patent statute 35 U.S.C. 285 pertaining to attorneys' fees?

4. Were Respondents' proofs legally sufficient to justify the award of damages for antitrust violation and did the courts abuse their discretion in the amounts allowed for attorneys' fees both for antitrust prosecution and defense for patent infringement?

5. Were the separate awards of attorneys' fees to Respondents in the instant case, one for antitrust prosecution, the other for the defense of patent infringement, legally proper in view of the fact that Petitioner's licensees (so-called co-conspirators) had been absolved by Respondents of all liability for attorneys' fees both for the antitrust and patent defense of the case in a settlement arrangement and Petitioner had purged himself of such alleged misuse long prior to such settlement?

STATUTORY PROVISIONS INVOLVED.

The statutory provisions here involved are:

Title 15, U.S.C.A., Sec. 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Title 35, U.S.C.A., Sec. 285:

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

STATEMENT OF THE CASE.

This suit was instituted in April, 1950, as an action by the patentees Clyde E. Clapper and Lee Flora against The Original Tractor Cab Co. and Stanley Williams of Arlington, Indiana, for infringement of two patents, Clapper patent No. 2,452,834, and Flora patent No. 2,461,974, and the basis for jurisdiction of the Court of first instance was 28 U.S.C.A., Secs. 1331, 1332, 1338, 2201, 2202, and for the Counterclaim and Cross-Complaint, 15 U.S.C.A., Secs. 1, 4, 14, 15 and 26. Defendants, Respondents here, denied infringement, contested the validity of the patents, joined the licensees of the patents as cross-defendants and counterclaimed for misuse of the patents and antitrust violation.

Early in 1948, two years before this suit was filed, the United States Patent Office declared two interferences involving Clapper's application for patent and two other applications, one of Lee Flora of Fairmount, Illinois, and the other of Michael A. Halligan of Fort Dodge, Iowa. In April, 1948, a meeting was arranged in Chicago between Clapper, Flora and Halligan and their licensees and attorneys in an attempt to settle the interference contro-

In this Petition exhibits of Petitioner where referred to will be abbreviated "PX" followed by the numeral given the exhibit when marked; exhibits of Respondent will be abbreviated "DX" followed by the letter or letters given the exhibit when marked, and references to Petitioner's record, plaintiff below, will be abbreviated "PR", and references to Respondents' record, defendants below, will be abbreviated "DR" followed by the page numbers referred to.

versies. At the Chicago meeting proofs of the respective parties were compared and it was determined that Clapper and Flora should prevail and receive the patents covering a tractor heater and weather protection device which was the subject of the applications. An outgrowth of the Chicago meeting and settlement was the Group Agreement, PX 33, PR 491-502, between the inventors Clapper, Flora and Halligan, and their licensees signed at Des Moines, Iowa, August 3-4, 1948. By the terms of the Group Agreement Clapper's licensee, Bearing Distributors of Kansas City, later Comfort Equipment Co., Flora's licensee, the Cab-Ette Co. of Danville, Illinois, and Halligan's licensee, the Fort Dodge Tent & Awning Co., later Burch Manufacturing Co., were given the exclusive rights in the Clapper and Flora inventions and the patents when issued.

Infringers soon became active and among the first were the D & D Co., of Fort Dodge, Iowa, the Mason City Tent & Awning Co., of Mason City, Iowa, and the Original Tractor Cab Co., Respondent here. Notice of infringement was sent to these companies and that sent to Original Tractor Cab Co. was dated November 24, 1948, PX 119, PR 515. A second notice was sent to Original Tractor Cab Co., DX SS-3, PR 704, on August 20, 1949. Respondent Stanley Williams, president of Original Tractor Cab Co., after receiving the second infringement notice, solicited the group members to become a member and licensee under the patents, so a second meeting was arranged in Chicago on September 12, 1949, at which time representatives of the group, their attorneys, the inventors Clapper and Flora and their attorneys, met with Williams and his attorney. At this meeting Williams' request for license was considered and after full discussion was refused. At the same meeting Clapper made an agreement with Williams, afterwards confirmed in writing, that The Original Tractor Cab Co. would discontinue the manufacture of the

infringing Half Cabs if Clapper would permit the company to dispose of the inventory it had on hand, PX 120, through PX 124, inclusive, PR 243-245; 515-521.

Immediately after the Chicago meeting in September, 1949, and while respondents were supposedly disposing of their inventory under the agreement made with Clapper, Williams made a working arrangement with the Cab-Ette Co., a member of the group and a licensee under the Clapper and Flora patents, so he and his company could continue the manufacture and sale of the accused Half Cabs, designating them as "Original Cab-Ettes", PR 175-176, 189-190. The general terms of this arrangement are contained in PX 1, and the date of its commencement is fixed by the corporate minutes, PX 174, PR 601-604. These Original Cab-Ette tractor covers were identical to the Half Cab covers previously manufactured by the Original Tractor Cab Co., except for the name "Original Cab-Ette" which was substituted by stencilling on the cover for the name "Original Half Cab". Also on these Original Cab-Ette covers manufactured and sold under this working arrangement were printed the patent numbers of both the Clapper and Flora patents, indicating they were made under license. PX 25, PR 486. A royalty was paid by Respondents to the patentee Clapper on all Original Cab-Ette covers made during the working arrangement, PX 30-31, PR 488-489. Contemporaneously with this working arrangement between Respondents and the Cab-Ette Co., Williams advised his distributors that they need not have further anxiety over infringement of the Clapper patent, PX 47A and 180, PR 513-514 and 620.

Disagreement arose between Respondents and the Cab-Ette Co., so by the end of November, 1949, the working arrangement was terminated, PX 32, PR 490. Thereafter Respondents had only to change the marking of the covers from "Original Cab-Ette" to "Original Half Cab" and noti-

fied Clapper the company was resuming manufacture, thereby renouncing the agreement made with Clapper at the Chicago meeting on September 12, 1949, PX 124, PR 521. The foregoing circumstances culminating in the breach by Respondent Williams of the Chicago agreement led to the filing of the complaint in the instant case on April 14, 1950.

The prosecution of the case progressed slowly during the early stages because of the discovery proceedings and the heavy docket of the Trial Court. Three years between June 15, 1951 and May 10, 1954, were consumed in the determination of the propriety of joining the licensees of Clapper and Flora as cross-defendants in this suit, so during this period the prosecution of all other issues in the case was stayed. Petitioner Clapper took no part in this phase of the case. In December, 1950, Respondents were offered a license under the Clapper patent by Petitioner's attorney, but the offer was refused, PX 133-134, PR 303, 522-523.

About a year after the complaint in this case was filed, the Department of Justice, instigated by Respondents, filed suit in the Western District of Missouri, Civil Action No. 6895, against the cross-defendant licensees, and the patentees Clapper and Flora, for violation of the antitrust laws. That action was terminated by a Consent Decree dated October 27, 1953, Appendix Exh. C, pp. A107-A114. During the pendency of the Government suit, the objectionable Group License, PX 33, was terminated by an agreement dated May 6, 1953, PX 137 and PX 137A, PR 532-536, which made termination of the agreement effective as of November 15, 1952. All infringers who had been noticed by the patentees Clapper and Flora, including Respondents, were sent a copy of the Consent Decree which made an offer of license obligatory upon the patentees Clapper and Flora, PX 135, PR 523. No mention

was made in the Consent Decree which terminated the Government suit of the instant case, although the Government suit and this case were pending and being prosecuted simultaneously. Upon termination of the Group License new licenses were immediately negotiated and signed by the group members, and separate licenses were negotiated and granted to manufacturers who had not been members of the group, PX 138 and PX 151, PR 536, 553-558, and PR 247-248. On December 14, 1954, the patentee Flora and the three cross-defendants, Comfort Equipment Co., Burch Manufacturing Co., and Cab-Ette Co., who had previously been members of the group, made settlement with Respondents upon payment of One Hundred Ten Thousand Dollars ($110,000.00) PX 172, PX 173, PR 590-601. By the terms of settlement the parties attempted to preclude Clapper from any and all advantages resulting therefrom and at the same time the cross-defendant licensees and Flora contracted with Respondents' attorneys that under the settlement the latter waived all claim to attorneys' fees that might be claimed for their prosecution of this case, PX 199, PX 200, PR 431-435.

By January, 1955, through such discovery as Petitioner was able to obtain in spite of Respondents' misrepresentations as to the destruction and non-existence of pertinent records, Petitioner amended his complaint bringing into the case the Original Cab-Ette working arrangement and the breach of contract issues previously mentioned besides patent infringement, and it was upon this pleading and the responsive pleadings thereto that the case was tried from June 3 to 28, 1957. By its first Memorandum Opinion dated January 3, 1958, the Trial Court found that Respondents were entitled to recover compensatory damages in the following amounts:

(1) Costs resulting from forced stoppage of production, from August 22, 1949 through September 23, 1949	$ 2,561.45
(2) Expenses incurred in finance negotiations	317.20
(3) Advertising costs rendered useless by reason of forced work stoppage	4,563.70
(4) Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5) Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952	7,905.60
	$27,611.35

Appendix Exh. A, p. A39.

This assessment, when trebled, amounted to $82,834.05. By crediting against this sum the $110,000.00 paid by cross-defendants' licensees under the Settlement Agreement of December 14, 1954, the liability of Clapper for compensatory damage was liquidated. The Trial Court, however, further held that there remained a liability for the payment of Respondents' attorneys' fees for services rendered in defending the patent infringement action which the Court decided fell within the category of "exceptional cases" under Title 35 U.S.C.A. 285. The allowance for such services was in an amount of $28,244.31. In addition to the payment of the attorneys' fees in connection with the patent infringement action, the Trial Court stated Respondents were entitled to recover from Clapper reasonable attorneys' fees for services of their attorneys in the prosecution of the counterclaim and cross-complaint for antitrust violations on the part of Clapper, Flora and the co-defendant licensees. The Trial Court also assessed against Clapper the entire costs of

suit expended by Respondents in their defense to each cause of action of the complaint and in the prosecution of the counterclaim and cross-complaint for antitrust violation, Appendix Exh. A, pp. A68-A69. By its second Memorandum Opinion dated July 9, 1958, included in Appendix Exh. A beginning at page A41, the Trial Court allowed Respondents' attorney $25,000.00 for prosecution of the antitrust phase of the case with this comment:

> "The court is well aware that this sum represents just a little less than the compensatory damage found to have been sustained by defendants, but except for the difficulty of proof, it is ventured that the actual damage suffered as a direct result of the violation of the antitrust laws by the plaintiff and his co-conspirators would have been found to be far greater." Appendix Exh. A, p. A48.

A Bill of Costs totaling $39,257.26, Appendix Exh. A, pp. A49-A50, submitted by Respondents upon objection by Petitioner was reduced and assessed by the Trial Court in an amount of $2,706.43, Appendix Exh. A, pp. A68-A69. An appeal was taken by both Petitioner and Respondents, and the Court of Appeals decision was rendered September 30, 1959. Appendix Exh. B, pp. A70-A106.

A chart of this Statement of Facts presenting some of the more important events and circumstances arranged in chronological order is bound in at this point covering the period from the first Chicago meeting, in April, 1948, through the Court of Appeals decision September 30, 1959.

STATEMENT OF FACTS CHRONOLOGY

Chicago Meeting - Interferences Settled	Apr. 28	
Group License (Px 33) signed	Aug. 3, 28	
First Notice of Infringement (Px 119) sent Respondents	Nov. 22, 48	
Second Notice of Infringement sent Respondents (Px 55-3)	Aug. 20, 49	
Second Chicago Meeting - Clapper Williams Agreement (Px 120 through Px 124)	Sept. 12, 49	
Respondent - Cabelle Working Arrangement	Sept. 15 - Nov. 10, 49	
Complaint Filed CA 2255 District Court S.D. Indiana	Apr. 14, 50	
Petitioner's Offer of License (Px 38) refused by Respondents	Jan. 3, 51	
Government Suit CA 6895 for Anti-Trust Violations filed in Western District of Missouri	Apr. 27, 51	
Petitioner's Licensees joined as Cross Defendants in CA 2255	June 8, 51	
Cross Defendants' Motion to Dismiss for Improper Venue	June 15, 51	
Group License (Px 33) terminated as of this Date	Nov. 15, 52	
Consent Decree in Government Anti-Trust Suit CA 6895 (Px 136)	Oct. 27, 53	
Venue Question terminated by Mandate CA 7th Circuit	May 10, 54	
Settlement and Dismissal of Patentee Flora and Cross Defendants	Dec. 4, 54	
Release and Waiver of Claims of Respondents' Attorneys and Attorneys' Liens	Dec. 14, 54	
Amended Complaint in CA 2255 Filed	Jan. 13, 55	
	1956	
Trial CA 2255 Dist. Court S.D. Ind. Indianapolis Div.	June 3 - 28, 57	
Trial Court's 1st Opinion (Findings of Facts and Conclusions of Law) — Damages for Anti-Trust Violation and Attorneys' Fees for Prosecution of Patent Phase of Case assessed against Petitioner	Jan. 3, 58	
Judgement in CA 2255	Jan. 14, 58	
Petitioner's Motion for Admission of Exhibits 199 and 200 being an Agreement and a Waiver and Release of Attorneys' fees dated Dec. 4, 1954	June 19, 58	
Trial Court's 2nd Opinion (Memorandum Entry) — Costs and Attorneys' Fees for Prosecution of Anti-Trust Phase of Case Assessed against Plaintiff	July 9, 58	
Court of Appeals' Decision	Sept. 30, 59	

ARGUMENT.

Questions 1 and 2.

Title 15, U.S.C.A., Sec. 15 of the Sherman Antitrust Act provides that besides recovery of three-fold the damages sustained, the person injured shall also recover the "cost of suit, including a reasonable attorney's fee." From the language of this section of the statute, it is evident that the attorney's fee provided is for prosecution of the antitrust phase of the case and is something separate and distinct from the damages recovered, the latter being trebled, while the attorney's fee is for a definite amount to be fixed by the court.

The instant case was brought for patent infringement and antitrust violation was charged by the counterclaim and cross-complaint. The Trial Court in allowing an attorney's fee fixed the amount at $25,000.00 for prosecution of the antitrust violation and $28,244.31 for prosecution of the patent infringement phase. With respect to the latter, the Court found as Fact Number 71:

> "71. The evidence shows that the defendant, Original, has incurred in fees and expenses obligations for $28,244.31 in defense of the patent infringement action instituted by the plaintiff and Flora as a part of the conspiracy in violation of the antitrust laws. The court finds these legal fees and expenses to be reasonable for the services rendered by counsel for the defendant, Original, in the defense of the patent infringement litigation, and should be awarded to defendant's counsel for such services. Said sum, however, is not to be included as an element of damages in the antitrust action to be increased threefold, as defendants would have the court do. It is to be awarded counsel for the

defendants by reason of their representing the successful parties in the patent infringement action, and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact." Appendix Exhibit A, p. A27.

This award for patent infringement prosecution was obviously made under Title 35, U.S.C., Sec. 285, providing in patent cases an award of "reasonable attorney fees to the prevailing party" in "*exceptional cases*".

The Court of Appeals in reversing the District Court as to how this award should be assessed stated:

"* * * In the case before us the District Court's finding of fact No. 71 states this to be an 'exceptional' case, and directs award of attorneys' fees for that reason. Defendants argue that the award is inadequate. They liken the situation here to that in Kobe, Inc., v. Dempsey Pump Co., D.C. Okla. (1951), 97 F. Supp. 342, 89 USPQ 54, affirmed 10 Cir., (1952) 198 F.2d 416, 94 USPQ 43, cert. den. 344 U.S. 837, 95 USPQ 417. There attorneys' fees incurred in defense of a patent infringement suit were held to be recoverable as damages sustained through antitrust violations. Here the District Court declined to include the attorneys' fees incurred in the patent infringement defense as an element of damages in the anti-trust action (to be increased threefold)." (Appendix Exh. B, p. A83.)

Then after quoting a part of the District Court's finding No. 71, the Appeal Court further commented:

"However, the District Court made no specific finding that the adverse party had been guilty of bad faith, inequitable, or unconscionable conduct 'in the case concerning the validity of the patent'. These are the usual bases for awarding attorneys' fees in patent cases. Continental Art Co. v. Bertolozzi, 7 Cir. (1956) 232 F.2d 131, 134, 109 USPQ 231, 233-234; Wilson v.

Seng Co., 7 Cir. (1952) 194 F.2d 399, 404, 92 USPG 197, 201; Apex Electrical Mfg. Co. v. Altorfer Bros. Co., 7 Cir. (1956) 238 F.2d 867, 874, 111 USPQ 320, 324-325. On the other hand, the District Court's reference to use of the patent by the patentee and his licensees can have reference only to the anti-trust violations. The record of this eight-year long litigation fully supports such a finding and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the anti-trust action." (Appendix Exh. B. p. A84).

This brings the instant case under the doctrine of *Kobe, Inc., v. Dempsey Pump Co., supra*, except that in the Kobe case the District Court made the award of attorney fees for defending the action for patent infringement solely as a damage item to be trebled and specifically denied such fees as allowable under the patent statute. The District Court's finding 80 in the Kobe suit reads:

"80. Attorneys' fees of the Defendants in the infringement action and the unfair competition action have been allowed as damages upon Defendants' counterclaim under the antitrust laws, but are denied under the provisions of Title 35, U.S.C.A., Sec. 70 (now Sec. 285), and the Court finds that circumstances requiring an award under the latter statute are not shown by the record." (Parenthesis ours). 97 F. Supp. 342 at 354.

Judge Parkinson in the instant case dissented to that portion of the majority opinion reversing for failure to include attorney's fees and expenses in defense of the patent infringement phase of the case as an element of treble damages. He recognized that the award was made by the District Court under Title 35, U.S.C.A., Sec. 285. and that that Court specifically refused to include it as an element of damage in the antitrust action. He pointed

out, as did the Court in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 at 797, that:

> "When 15 U.S.C.A., Sec. 15, was enacted by Congress, the word 'damages' had acquired, through judicial interpretation, a well understood legislative meaning and it did not include attorney fees incurred in defending civil actions. *Oelrichs* v. *Spain*, 1872, 82 U.S. 211, 231; *Flanders* v. *Tweed*, 1872, 82 U.S. 450, 453; *Tullock* v. *Mulvane*, 1902, 184 U.S. 497, 511; *Missouri, Kansas etc., R'y Co.* v. *Elliott*, 1902, 184 U.S. 530, 539-540; *Straus* v. *Victor Talking Mach. Co.*, 2 Cir., 1924, 297 Fed. 791, 797. There is nothing in the Act to the contrary, and, in my opinion, any legal basis for an attorney fee allowance in the successful defense of the patent infringement phase of this action could emanate from and find its source only in 35 U.S.C.A., Sec. 285." Appendix Exhibit B, p. A105.

Commenting on the *Kobe* and *Straus* cases, *supra*, he had this to say:

> "As I read the case of *Kobe, Inc.*, v. *Dempsey Pump Co.*, 10 Cir., 1952, 198 F.2d 416, I am impressed with the thought that the question of the right to include counsel fees incurred in the successful defense of a patent infringement suit as an element of damage in an antitrust action was not squarely raised and decided by the Tenth Circuit, although the District Court so held. However, if the Tenth Circuit did so decide, I am constrained to disagree and am of the opinion that the Second Circuit was correct in its decision in *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791." (Appendix Exh. B, pp. A105-A106).

The decision of the Second Circuit Court of Appeals in the Straus case bears closer scrutiny because it is the only tribunal that squarely meets the question as to whether the bringing of suit to establish rights such as a suit for infringement of a patent may constitute "a step

in pursuance of the combination" or conspiracy in an antitrust action. The decision of the Court of Appeals of the Second Circuit in the *Straus* case, 297 Fed. 791 at 797, reads:

> "What the court held, and what plaintiffs now contend, is, when simply stated, that resort to the courts, if unsuccessful, may be a step in violation of the statutes here concerned, and that a jury may so find, and award as part of the damage the fees of the attorneys of the successful party. If Victor Company had been successful, plaintiffs would not be here; for, in that event, the license agreements would have been held lawful. We think this mere statement displays the error in this regard.
>
> "The sections of the statutes (noted in the margin) speak of the 'damages by him sustained.' 'Damages' must be construed as that term was known to the law when these acts were passed. Kepner v. United States, 195 U.S. 100, 124, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655. As said by the Supreme Court in Pennsylvania Railroad Company v. International Coal Company, 230 U.S. 184, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, when construing section 8 of the Interstate Commerce Act (Comp. St., Sec. 8572):
>
> > 'The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained.'
>
> "In various classes of cases, 'damages' have been held not to include counsel fees incurred in defending civil actions. Oelrichs v. Spain, 15 Wall. 211, 21 L. Ed. 43; Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; Tullock v. Mulvane, 184 U.S. 497, 22 S. Ct. 372, 46 L. Ed. 657; Missouri, Kansas, etc., Railway Co. v. Elliott, 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673.

"We think the question here is not one as to 'probable cause', and much that is argued by both sides upon that point may be passed by. Whether an action will lie in the federal courts to recover damages for the prosecution of a civil action or suit instituted maliciously and without probable cause has not yet invited determination by the Supreme Court, although other courts have declined to entertain such actions. Tamblyn v. Johnston, 126 Fed. 267, 62 C.C.A. 601; Ray v. Law, 1 Pet. C.C. 207, Fed. Cas. No. 11,592; Potts v. Imlay, 4 N.J. Law 330, 7 Am. Dec. 603; Quartz Hill Gold Mining Co. v. Eyre, L.R. 11, Q.B. 674. Per contra, in certain circumstances and with certain limitations: Willard v. Holmes, Booth & Haydens, 142 N.Y. 492, 496, 37 N.E. 480; Ferguson v. Arnow, 142 N.Y. 580, 37 N.E. 626; Burt v. Smith, 181 N.Y. 1, 5, 73 N.E. 495, 2 Ann. Cas. 576; Wade v. National Bank of Commerce, (C.C.) 114 Fed. 377; Wilkinson v. Goodfellow-Brooks Shoe Co., (C.C.) 141 Fed. 218.

"We think the question goes deeper, and we place our decision on a ground more fundamental. Free access to the courts must neither be denied nor penalized. Of this principle, the case at bar is a perfect illustration. When the suit of Victor v. Straus was brought, the most which can be said against Victor Company is that the questions litigated were debatable. The court of last resort to which an appeal could be taken without permission by way of certiorari had declared in 230 Fed. 449, 144 C.C.A. 591, that Victor Company was right. The Supreme Court on certiorari reversed on the same day upon which it announced repudiation of Henry v. Dick, supra. In such circumstances, to say that a suit brought to determine rights may be a part of a scheme to violate statute law, and, if so, that the suitor may be subject to respond in damages, is to announce that he who seeks the judgment of the courts does so at his peril."

It was a coincidence that Judge Manton dissented to the majority opinion in the Straus case as did Judge Parkinson in the instant suit.

"I dissent from the disallowance of damages sustained by the plaintiff below for counsel fees paid for defending the alleged patent infringement suit. There the bill was held to have no merit, and, on the contrary, it was, in substance, held to be a disguised attempt to control the prices of its machines after they were sold and paid for. Straus v. Victor, 243 U.S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L.R.A. 1917E, 1196, Ann. Cas. 1918A, 955. It brought forth the following statement in the opinion:

> "That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that, at least until the exigency out of which this case grew arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in terrorem over the ignorant and the timid."

"Thus the purpose was plain to the Supreme Court on the plaintiffs' own bill. Moreover, complete evidence presented to the jury below resulted in a finding by it that this so-called patent infringement suit was not brought in good faith or candor, and was a step in an unlawful conspiracy, the purpose of which was to maintain an illegal system for maintaining prices.

* * *

"Thus the theory of liability for counsel fees is based on the nature of this conspiracy action under the Sherman Law. In the cases referred to in the prevailing opinion (Oelrichs v. Spain, 15 Wall. 211, 21 L. Ed. 43; Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; Tullock v. Mulvane, 184 U.S. 497, 22 S. Ct. 372,

46 L. Ed. 657; Mo., Kan., etc., Ry. v. Elliott, 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673), there is no finding of fact, as here, that the bringing and prosecution of the suits were part of the unlawful scheme and design to make effective the chief object of the unlawful conspiracy. The general principle of the cases cited has long been recognized, and seems to be by the plaintiffs below. They adhere to the rule that the mere bringing and prosecution of a suit is not a wrongful act, without regard to its merits or its outcome. Resort to the courts is an individual's legal right, and counsel fees are denied as damages, not because they are incapable of being an element of damages, and directly resulting from violation of right, but because in such cases the bringing of suit was not a wrongful or illegal act, and no legal right was therefore violated. But this suit was wrongful, and found to be an illegal act. It was begun to accomplish an illegal end (so the jury found), and the authorities based on the proper exercise of a legal right, have no application. This is an action in tort, and the damages recoverable depend upon whether the act complained of is unlawful. Whether damages are recoverable under the Sherman Law depends upon whether the act or acts complained of are within the prohibition of the statute. If they are, and therefore illegal, and are the direct cause of injury, then under section 7 such damages are recoverable.

* * *

"There is a finding here that the motives and inducements of a suit decided adversely to the defendants below affected the combination and constituted a wrong. The Sherman Law is a limitation of rights which may be pushed to evil consequences, and therefore restrain, even though the offender depends upon patent rights or a license thereunder. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S. Ct. 9, 57 L. Ed. 107. No rule of public policy giving free access to the courts is available to the defendants be-

low, who, after a trial, have been found to have used the court as an instrument to accomplish unlawful acts and as a means to profit by an illegal conspiracy. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007. Statutory costs were never intended as compensation for an action wrongfully maintained.

"Nor is this an action for malicious prosecution. It is for unlawful conspiracy, followed by wrongful acts, among which is the institution and maintenance of this so-called patent suit. Probable cause for the suit is important in the defense of a malicious prosecution action, but the plain issue here was whether or not the so-called patent suit was oppressively maintained and used as an instrument for the unlawful combination to suppress and destroy competition. Here there was first established the combination, and thereafter the evidence surrounding the patent litigation was received. It was shown to be directly in line with the objects of the conspiracy. In resisting that suit, the plaintiffs below incurred the counsel fees which they now seek in reimbursement as an element of damage resulting from the wrongs committed against them by this unlawful combination in restraint of trade. This defense was imperative, in order that the plaintiffs below might protect their rights as against the tortious conduct of the defendants below. They were obliged to do this to meet the wrongdoing of the defendants below, and the counsel fees incurred were an immediate and direct result.

* * *

"A suit of the nature prosecuted by the defendants below is peculiarly a strong instrument in the hands of an unlawful combination to suppress and destroy competition. The sinister intent and illegal object of the basic conspiracy in which the suit is but a step, and yet an integral part, and constitutes a wrongful act, is the material object. The Supreme Court said in Straus v. Victor Co., 243 U.S. 490, 37

S. Ct. 412, 61 L. Ed. 866, L.R.A. 1917E, 1196, Ann. Cas. 1918A, 955:

> 'Convinced * * * that the purpose and effect of this "Licensed Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of Adams v. Burke, 17 Wall. 453, 456, 21 L. Ed. 700, 703, and of Bauer v. O'Donnell, 229 U.S. 1, 57, * * * that it is therefore invalid, and that the District Court properly held that the bill must fail for want of equity.'

* * *

"The allowance of counsel fee as an element of damage in the instant case must be considered with due regard for the intention of Congress in providing for compensatory damages for wrongs committed under the Sherman Act. Undoubtedly, the direct consequences of the wrongful act of the defendant below was the expense of the employment of counsel. Reasonable value of this service is fixed by the testimony. Evidence as to the reasonableness of the service and the value thereof is as common as fixing the value of labor in any other pursuit. Head v. Hargrave, 105 U.S. 49, 26 L. Ed. 1028. The practical effect of such a loss under such circumstances as this record discloses calls for that progress in the law as to meet the progress of the times. The fact that the statute trebles the damages does not affect the situation. The Sherman Act is to be liberally construed to repress the evil and advance the remedy. Chattanooga Foundry Co. v. Atlanta, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241; Ware, etc., Tobacco Co. v. American Tobacco Co. (C.C.) 178 Fed. 117."

(297 Fed. 808-812.)

The dissenting views of Judge Manton in the Straus case and Judge Parkinson in the instant case point up the divergence of opinions the courts have had with respect to the meaning of the language of this section of the statute. It is submitted that this conflict begs intervention by this tribunal to promulgate, establish and decree how the section should be interpreted.

It is also significant to note with regard to these first two questions presented for review the difference in the facts involved in the Kobe and Straus cases as compared with those in the instant suit. In the Kobe case the Oklahoma Court was dealing with a still existing antitrust violation in which a large number of patents were used to maintain a total monopoly, while any antitrust violation in which petitioner Clapper may once have been involved had ceased more than four years prior to the trial of the present case. Unlike the Kobe case, Clapper was not currently, at the time of the trial, using a large collection of ninety patents to maintain a complete monopoly in an industry, but had only one patent and for some time had been granting licenses thereunder to anyone and everyone who asked for one; Kobe never granted a single license. In the Straus case the patent holder had abandoned its objectionable licensing practice before trial of the antitrust action in which the question of trebling attorney's fees for defense of the patent litigation arose, and the same is true here. In this regard, petitioner is even more free of criticism than was true of the patent holder in the Straus case, for there the patent holder abandoned its objectionable practice only after there had been a judicial determination, appealed all the way to the Supreme Court, that it was in fact an illegal practice. Petitioner, on the other hand, abandoned the objectionable licensing arrangement of August 3-4, 1948, PX 33, long before there was any judicial determination of its validity.

Question 3.

The Trial Court in this case, upon arriving at the amount allowed respondents for the defense of the patent action, found:

> "71. * * * It is to be awarded counsel for the defense by reason of their representing the successful parties in the patent infringement action and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact."

By this finding the Court unqualifiedly intended that the fee was awarded under Title 35, U.S.C.A., 285, because it not only used the terminology of the patent statute pertaining to attorney's fees, but included limiting language to exclude it from the damage assessment.

> "Said sum, however, is not to be included as an element of damages in the antitrust action to be increased three-fold." Appendix Exh. A, p. A27.

In this regard the instant case is clearly distinguishable from the Kobe case for there the Oklahoma District Court found:

> "80. Attorneys' fees of the Defendants in the infringement action and the unfair competition action have been allowed as damages upon Defendants' counterclaim under the antitrust laws, but are denied under the provisions of Title 35, U.S.C.A., Sec. 70 (now 285), and the Court finds that circumstances requiring an award under the latter statute are not shown by the record (Parentheses added). 97 F. Supp. 342, at 354."

From these findings in the respective cases it is obvious that the attorney's fees here were levied under the

patent statute and in the Kobe case as an item of damage, specifically exempted from the patent statute.

The Appeal Court in the instant case then adopted the amount of the award made by the lower court under the patent statute and proceeded without evident authority to assign to it a new designation so it could be trebled with the compensatory damage assessment. To justify this shift and bring the findings in closer conformity with the Kobe case, the Court had this to say:

> "* * * the District Court made no specific finding that the adverse party had been guilty of bad faith, inequitable or unconscionable conduct in the case 'concerning the validity of the patent'. These are the usual bases for awarding attorneys' fees in patent cases (Citing cases). On the other hand the District Court's reference to use of the patent by the patentee and his licensees can have reference only to antitrust violation. The record of this eight-year long litigation fully supports such finding and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the antitrust action." Appendix Exh. B, p. A84.

As far as petitioner has been able to determine, the patent statute pertaining to attorney's fees, 35 U.S.C.A. 285, never contemplated that an award thereunder should ever become an item of damage to be trebled under the antitrust laws. Attorney's fees and expenses attending the defense of a patent infringement action where such action forms a part of an antitrust suit, although the patent phase be considered a part of a conspiracy, would seem more logically included as a part of the attorney's fees awarded under the section of the Sherman or Clayton Acts pertinent thereto, since the prosecution of both actions is invariably simultaneous and the order of proofs closely related.

Questions 4 and 5.

Damages As to Loss of Potential Sales to Farm Equipment Sales Co. and Stover Winsted (Items of Damage 4 and 5. Appendix. Exhibit A. p. A39).

Respondents treated a statement of losses (DX JJJ. DR 172-175) prepared by their accountant as firm proof of the fact that Farm Equipment Sales Co. would, except for the alleged conspiracy, have purchased all of their tractor covers from respondents rather than Comfort Equipment Company. The record, however, clearly reveals that this is an altogether unwarranted conclusion and that Farm Equipment Sales Co. fully intended to sell simultaneously tractor covers manufactured by both Comfort Equipment and respondents. The testimony of Harold McVicar, president of Farm Equipment, is unequivocal on this point, PR 902. McVicar's testimony is corroborated by a letter to respondent Original Tractor Cab Co., DX KKK-2, PR 904.

Since Comfort Equipment Co. and Original Tractor Cab tractor covers were to be handled together by Farm Equipment, the best that respondents could have hoped for was, at most, one-half of the business, and there was no showing that they could have achieved even that amount of business. Accordingly, respondents should have had recovery for no more than 4,542 units (one-half of the sales of Comfort Equipment to Farm Equipment).

With respect to the alleged Comfort Equipment tractor covers purchased by Stover-Winsted upon which loss of potential sales to Stover-Winsted is based, there is not one shred of evidence to substantiate the award. The figures arrived at were obtained from a note on the statement of losses, DX JJJ, reading:

"Supplied by Attorney P. Swecker from Answers to Interrog." PR 711.

These figures are not, however, to be found in the record of this case either in "Answers to Interrog." or elsewhere. It is thus seen that the figures relied upon for loss of potential sales of Farm Equipment and Stover-Winsted, the largest items in the damage assessment in this case, have no competent evidence which would constitute a basis of proof and certainly not that required in antitrust violation cases. There is no competent evidence that Comfort Equipment Co. sold any tractor covers to Stover-Winsted in 1952, and to average the alleged sales made the preceding year is to engage in arrant speculation.

In fact, the record is barren of evidence as to the number of tractor covers purportedly purchased from Comfort Equipment by Stover-Winsted in the years 1949 through 1952 upon which a legitimate estimate could be made as to the number of tractor covers respondents could have sold Stover-Winsted during the same period. The District Court's award of damage in the case of these two companies was therefore based on nothing more than assumption, speculation and conjecture, and not upon competent proofs.

It is established by the evidence before the Trial Court that when respondent Original Tractor Cab Co. first solicited Farm Equipment in 1949 to become a distributor, Farm Equipment was already an established distributor of Comfort Equipment Co. Farm Equipment Co., however, agreed to handle the tractor covers of both companies, affording Farm Equipment two sources of supply and two lines of differently priced tractor covers. As matters developed, the plan was never put into effect and Farm Equipment never handled any tractor covers except those of Comfort Equipment. From 1949 through 1956

Farm Equipment purchased from Comfort Equipment 9,084 tractor covers and an undetermined number purchased before respondents obtained their first and only order from Farm Equipment, so there is no competent evidence as to what portion of Farm Equipment purchases of tractor covers would have been given Comfort Equipment and what portion to respondent Original Tractor Cab Co. after August of 1949.

Furthermore, there is no evidence that Stover-Winsted ceased purchasing from respondents as the result of any act on the part of petitioner or any of the alleged co-conspirators. The utter failure of respondents to prove loss of potential sales to either Farm Equipment or Stover-Winsted should have been adequate grounds for reducing the damage award in an amount of the estimated potential sales of Farm Equipment and Stover-Winsted scheduled in the Trial Court's finding 72. Appendix Exhibit A, page A28.

Proofs to establish the first three items of damage, namely:

(1) Costs resulting from forced stoppage of production in an amount of $2,561 45.

(2) Expenses incurred in finance negotiations, $317.20.

(3) Advertising costs rendered useless by reason of forced work stoppage, $4,563.70.

(Appendix Exhibit A, page A39)

are likewise as questionable as those adduced to prove loss of potential sales to Farm Equipment and Stover-Winsted.

> "The Congress, by allowing private actions, in aid of enforcement of anti-trust policy, did not intend to allow a person representing himself, or a group to bring an unlimited action for an unspecified amount, upon the bare allegation that a conspiracy exists. The

Congress intended to confine the remedy to persons who are actually damaged in their business, and damaged in a measurable amount.

"The Court of Appeals for the Seventh Circuit, in a noted case, made this statement:

> "'Injury in his business or property is a prerequisite to a person's right to maintain an action for treble damages.'" (Peller v. International Boxing Club, 7 Cir., 1955, 227 F.2d 593, 595).

"All courts agree that the damages of which the section speaks are not the type of general damages that are recoverable for an ordinary tort, but rather damages actually sustained, which are susceptible of measurement." *Hess* v. *Anderson, Clayton Co.*, 20 F.R.D. 466 (1957).

Respondent's business was not destroyed, nor was it affected by the alleged conspiracy of petitioner and his licensees, as is shown by the Condensed Earnings Statement of Original Tractor Cab Co. for the years 1948 through 1956, incorporated in its accountant's report, DX JJJ, DR 175.

CONDENSED EARNING STATEMENT BY YEARS FOR THE PERIOD OF 1948 THROUGH 1956.

Total A. W. Cabs & H Cabs

	Profit	Loss
1948	$ 8,596.70	
1949		$13,958.67
1950	902.26	
1951	23,501.59	
1952	9,182.19	
1953		1,803.94
1954	85,584.27	
1955	3,593.44	
1956		25,762.07

After a loss of slightly less than $14,000 in 1949 profits are shown in every year through 1955 with the exception of a small loss in 1953 and a substantial loss in 1956. Respondent Original Tractor Cab Co. had profits in 1951, 1952 and 1954, the profits in 1952 exceeding by almost $10,000 the loss in 1949, and the profits in 1951 exceeding by almost $10,000 the loss in 1956. Also by 1956 there was no conspiracy in existence, since co-defendants had made settlement two years prior in December, 1954, and the objectionable group agreement had been cancelled as of November 15, 1952. A license was offered respondents January of 1951 and after settlement in the Government case in October, 1953, respondents were again offered a license as was the industry generally.

The only logical conclusion after viewing the above figures is that defendants' business was unaffected by any activities of petitioner or his licensees after 1949, but was subject solely to normal economic factors and business variables. Respondents conducted an illegal parasitic operation based on the appropriation and willful infringement of the Clapper patent and any loss that was sustained by respondents was caused solely by expenditures made voluntarily to conduct and support their illegal operation.

Why the Trial Court in this case was so lenient with respondents with respect to requirements for competent proof of damage was never understood, nor were the allowance of attorney's fees consistent with the damages actually sustained or even those assessed.

In *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 8 Cir., 194 F.2d 846, 858-859, the single damages awarded by the jury were $375,000.00. The District Court allowed a counsel fee of $150,000.00. The Court of Appeals for the Eighth Circuit reduced that amount to $100,000, which was about 26.6% of the single damage.

In *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 7 Cir., 190 F.2d 561, decided by the Court of Appeals for the Seventh Circuit, the single damages awarded by the District Court were, approximately, $432,000.00, and the counsel fee was $225,000.00. The Court of Appeals reduced the single damages to approximately $313,000.00, and the counsel fee to $75,000.00, or about 25% of the damages.

Paramount Film Distributing Corp. v. *Applebaum*, 5 Cir., 217 F.2d 101, 103, decided by the Court of Appeals for the Fifth Circuit, involved single damage of $150,000.00, with attorney's fees allowed in an amount of $40,000.00.

Thus it will be seen that it has been usual practice for the Courts to limit the attorney's fees to not substantially more than 25% of the single damage awarded, yet in the instant case the allowance of attorney's fees for the patent defense was in excess of the single damage award, and the allowance for attorney's fees for the antitrust action were almost as much as the single damage award.

Also, there is the significant circumstance that proofs in this case were previously made by the same counsel in *Mason City Tent & Awning Co.* v. *Clyde E. Clapper et al.*, 114 F. Supp. 754, Appendix Exhibit D, pages A115-A146. Although the District Court in this case refused to recognize it, the fact remains and can be readily determined by reading the decision in the Mason City case that the proofs, insofar as antitrust violation were concerned, were to a great extent the same. So, far from being confronted with unusual difficulties and problems due to the necessity of proving violation of the antitrust laws and the existence of a conspiracy, counsel's task was made exceptionally easy in this case, by virtue of the fact that those proofs had *already* been made in the Kansas City case and the issues had *already* been resolved therein. The defendants in the Mason City case were Clapper and the same corporate

licensees that were charged as being co-conspirators in the present case. The proofs that needed to be made here with respect to conspiracy and antitrust violation were the same proofs as were made in Kansas City. The attorney who made them in the Kansas City litigation is also principal counsel for the respondents here so, before presentation of his case, here, he already had the benefit of a "dry run" to test his theories and develop his presentation. Never was there a better example of litigation going to trial with the major work already done, with the proofs already tried and thoroughly tested at the expense of another client, with the evidence already at hand. Virtually all of the exhibits which defendants' counsel placed in evidence before this Court to establish conspiracy and antitrust violation (some 60 or 70 documents) had been exhibits in the Kansas City case and were, in effect, simply borrowed for use here. In addition, defendants availed themselves of the interrogatories in the Kansas City case, the pleadings therein and the rulings of Judge Ridge, not to mention the complete transcript of the testimony which Fred M. Roberts gave at the Kansas City trial.

To Judge Major's observation in *Milwaukee Towne* v. *Loew's Inc.*, *supra*, that the law "recognized no charge so easily made, so susceptible of proof by inference or otherwise" as the charge of conspiracy, we would add that if it is easy in an ordinary case, it certainly was made incomparably easier in the present instance, where it involved nothing more than going through the motions of duplicating what already had been done in Kansas City. Certainly, no unusual skill or competence was required; it was little more than a mechanical operation.

This indeed should have been a factor to be taken into consideration in determining what attorneys' fees were appropriate. *Bordonaro Bros. Theatres, Inc.* v. *Para-*

mount Pictures, Inc., et al., (D.C.N.Y., 1953) 113 F. Supp. 196. In the earlier trial referred to in the *Bordonaro* decision, attorneys' fees of $18,000 had been awarded. By fixing the amount at $4,500 on the second trial, the Court recognized that, even though counsel had to make proofs to establish continuance of the conspiracy, their services on the second occasion nonetheless were substantially less demanding, and merited only one-fourth of the attorneys' fee awarded in the previous case.

With this in mind, let it be noted that Judge Ridge allowed $5,000 as reasonable attorneys' fees in the Kansas City case, *Mason City Tent & Awning Co. et al. v. Clapper et al.*, 144 F. Supp. 754. If $5,000 represented the reasonableness of the services rendered by Mr. Swecker and his co-counsel in that litigation (and evidently it did, for they accepted it without any objection) it follows that here, where less work, less skill, less of everything was required, the true value of their services was substantially under $5,000.

Certainly it can be said that the allowance of attorneys' fees in the case at hand should represent but a very modest proportion of the $27,611.35 recovery, in view of the fact that substantially all of the work had previously been done in the Kansas City litigation. For that work defendant's principal counsel already has been paid once, out of the attorneys' fees allowed by Judge Ridge; to make an allowance here that would pay him a second time for the same work would be unconscionable.

Another flagrant error of the Trial Court in assessing the entire amount of attorneys' fees against petitioner for prosecution of the patent defense in this case is evident from the following facts:

(a) That patentee Flora and the three cross-defendants were co-conspirators with Clapper under

the Trial Court's interpretation from the institution of suit on April 14, 1950, until settlement on December 14, 1954.

(b) That petitioner Clapper was purged of any stigma of the alleged conspiracy by offer of license in January of 1951, and by the consent decree and offer of license at the termination of the Government suit in October of 1953,

(c) That the period from June 15, 1951 to May 10, 1954, was spent in the prosecution of the question of venue by respondents and cross-defendants during which time prosecution of the patent infringement phase of the case was dormant.

Petitioner also contends that the Trial Court's allowance of attorneys' fees against petitioner for the total amount expended by respondents for prosecution of their counterclaim for antitrust violation was clearly erroneous for the following reasons:

(a) That from the date of filing this suit on April 14, 1950, until June 15, 1951, when the venue question became the sole issue in the case, there were five alleged conspirators, so petitioner Clapper in any event could be liable only for one-fifth of any attorneys' fees that could be assessed for that period;

(b) In view of the fact that petitioner Clapper had purged himself on January 3, 1951, of any stigma of conspiracy by offer of license to defendants;

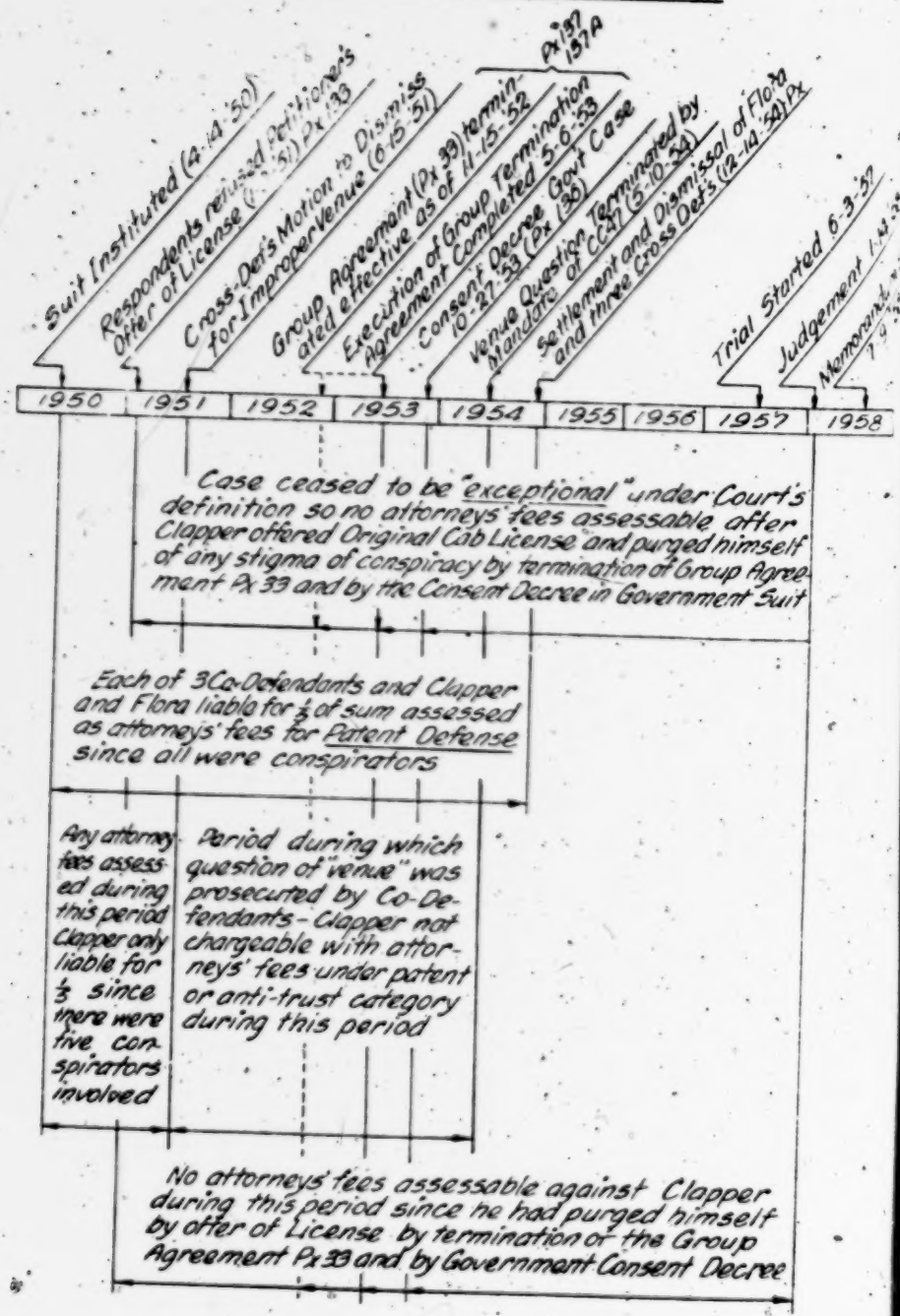
(c) Since petitioner Clapper had purged himself of any stigma of the alleged conspiracy by cancellation of the group agreement as of November 15,

1952, execution of which was completed on May 6, 1953, and by the consent decree in the Government suit October 27, 1953;

(d) When the period from June 15, 1951 to May 10, 1954, was spent in the prosecution of the question of venue by defendants and cross-defendants during which time prosecution of the antitrust phase of the case was dormant.

A chart showing graphically the significant dates and events bearing upon the errors above enumerated is bound in at this point.

CHART OF DATES AND EVENTS


Px 137
137A
Suit Instituted (4-14-'50)
Respondents returned Petitioner's Offer of License (1-15-'51) Px 133
Cross-Def's Motion to Dismiss for Improper Venue (6-15-'51)
Group Agreement (Px 39) terminated effective as of 11-15-52
Execution of Group Termination Agreement Completed 5-6-'53
Consent Decree Govt Case 10-27-'53 (Px 136)
Venue Question Terminated by Mandate of CCA (5-10-'54)
Settlement and Dismissal of Flora and three Cross Def's (2-14-'54) Px
Trial Started 6-3-'57
Judgement 1-23-'
Memoranda
1950
1951
1952
1953
1954
1955
1956
1957
1958
Case ceased to be "exceptional" under Court's definition so no attorneys' fees assessable after Clapper offered Original Cab License and purged himself of any stigma of conspiracy by termination of Group Agreement Px 39 and by the Consent Decree in Government Suit
Each of 3 Co-Defendants and Clapper and Flora liable for 1/3 of sum assessed as attorneys' fees for Patent Defense since all were conspirators
Any attorney fees assessed during this period Clapper only liable for 1/3 since there were five conspirators involved
Period during which question of "venue" was prosecuted by Co-Defendants - Clapper not chargeable with attorneys' fees under patent or anti-trust category during this period
No attorneys' fees assessable against Clapper during this period since he had purged himself by offer of License by termination of the Group Agreement Px 39 and by Government Consent Decree

PRAYER.

For the foregoing reasons your petitioner respectfully prays that a Writ of Certiorari be issued to the Court of Appeals for the Seventh Circuit to the end that this cause may be reviewed and determined by this Court: that the Judgment of the Court of Appeals for the Seventh Circuit be modified and that the petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

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